

1 A. I looked on the floor and underneath the seats.

2 Q. Okay. Did you open the objects that were on the
3 floor and underneath the seats?

4 A. I don't recall.

5 Q. Did you look, for instance, in the glove
6 compartment?

7 A. I do not recall, sir.

8 Q. You may have but you don't remember?

9 A. I don't remember.

10 Q. Okay. And you didn't look on top of the dash
11 there either?

12 A. I'm sorry, I don't recall.

13 Q. You didn't conduct what we call an inventory of
14 the items that were inside that car, did you?

15 A. No, sir, I did not.

16 Q. An inventory would be a listing of every item
17 inside the car, am I right?

18 A. Yes, sir.

19 Q. All right. So if I'm correct, what you did is
20 you looked for a casing --

21 A. Yes.

22 Q. -- in the car?

23 A. Yes, sir.

24 Q. You weren't looking for anything else, were you?

25 A. No, sir.

1 Q. How much time did you spend looking in the car
2 that day?

3 A. I don't know.

4 Q. Well, would you have spent more or less than 10
5 or 15 minutes looking inside the car?

6 A. I do not know.

7 MR. ARNTZ: Thank you. That's all.

8 THE COURT: Redirect.

9 REDIRECT EXAMINATION

10 BY MR. SLAVENS:

11 Q. Officer Bryant, let me hand you what's been
12 marked as Defendant's Exhibit A, which this is your
13 sketch made by you at the time you were at 1912
14 Tennyson?

15 A. Yes, sir.

16 Q. Or from there?

17 A. Yes, sir.

18 Q. Is that correct?

19 And with reference to particular the location of
20 where the two shell casings were prior to your time of
21 collection, is this Exhibit A more accurate than the
22 photographs?

23 A. No, sir. I would say the photographs are more
24 accurate because the photographs are scale whereas my
25 sketch is not.

1 Q. Okay. And both shell casings are depicted, am I
2 correct, in photograph State's Exhibit 58?

3 A. Yes, sir, they are.

4 MR. SLAVENS: Thank you. That's all I
5 have.

6 MR. ARNTZ: No questions.

7 THE COURT: Any recross?

8 MR. ARNTZ: (Shook his head in the
9 negative.)

10 THE COURT: You may step down.

11 * * * *

12 THE COURT: Could I see counsel?

13 (WHEREUPON, a discussion was held off the
14 record.)

15 THE COURT: Ladies and gentlemen of the
16 jury, the next witness is again like similar to last
17 night, a rather lengthy witness. So I think what we
18 ought to do is go ahead and break for the day.

19 Remember the usual
20 instructions from the Court not to discuss the case
21 among yourselves or with anybody else. Don't form any
22 opinions, you have not heard all the testimony yet.
23 Remember to avoid any form of news media whether it be
24 radio, television, or newspaper.

25 We don't have a very

1 pleasant weather report for tomorrow. I'm just
2 cautioning everybody. We are going to start tomorrow
3 at 9. Remember, tomorrow is a half day. Maybe you
4 will be lucky enough to get in and out of here before
5 it gets too bad. I'm referring to snow. But anybody
6 that lives in Dayton, Ohio, knows that our forecasters
7 aren't known for their accuracy when it comes to snow
8 predictions. Be aware of that problem when you wake
9 up tomorrow morning, leave yourself some extra time.
10 Obviously, drive careful. Get here safe and sound.
11 Start at 9. We may go a little bit past the noon
12 hour, then we will be in recess for the rest of the
13 day tomorrow.

14 Have a nice evening. We
15 will see you back tomorrow. We will try to get
16 started right at 9 o'clock.

17
18 (WHEREUPON, the proceedings for February 24,
19 1993, were then concluded at the hour of 3:58 p.m.)

20 * * * *

1 (February 25, 1993 - Morning Session)

2 9:17 a.m.

3 IN CHAMBERS

4
5 THE COURT: Let the record reflect we
6 are in chambers. Present are prosecutors and defense
7 counsel.

8 And the Court has had a
9 brief discussion with juror John Knox. And he has
10 provided the Court with a letter from his doctor
11 indicating that he should be relieved from any further
12 jury duty due to stress problems and possible
13 emotional difficulties. What I've just indicated is
14 not contained in the letter. The stress problems and
15 emotional difficulties was indicated to the Court by
16 Mr. Knox. The letter simply excused him from jury
17 duty at this time.

18 In view of what the letter
19 says the situation is, the Court is of the opinion
20 that the juror probably should be excused. However,
21 in view of the nature of the situation, the nature of
22 the case and in abundance of caution, at the request
23 of defense counsel, we will bring the juror in and
24 have him explain to the lawyers in his own words
25 basically, I presume, what he has already explained to

1 the Court not on the record.

2 It's the Court's opinion
3 that the letter, it is from Dr. Moon, which will be
4 made a part of the record and a court exhibit, is
5 sufficient to excuse the juror without any further
6 inquiry. Again, however, so that everyone feels that
7 their case is being fairly and impartially tried by
8 all concerned, I will permit a brief inquiry of the
9 juror and then make the final determination as to
10 where we go from there.

11 MR. SLAVENS: If I may, is Dr. Moon a
12 medical doctor? Is he a doctor that specializes more
13 so in the field of mental health?

14 THE COURT: It's Dong S. Moon, M.D.,
15 Diplomate, with an "e" at the end, American Board of
16 Psychiatry and Neurology.

17 MR. SLAVENS: Thank you.

18 THE COURT: He's connected with New
19 Perspectives, Professional Counseling Center, office
20 at 111 West First Street. And he's indicated in a
21 letter that not to hesitate to contact him if it
22 becomes necessary.

23 Let the record reflect that
24 it's the Court's understanding that defense counsel
25 will waive the presence of Mr. Howe for purposes of

1 inquiry of the juror.

2 MR. ARNTZ: That's correct. I
3 discussed the situation with him and he understands he
4 has the right to be present during this brief
5 discussion with the juror but he voluntarily consents
6 not to be here.

7 THE COURT: All right. Now, anything
8 further for the record, Mr. Slavens?

9 MR. SLAVENS: No.

10 (Pause in the proceedings.)

11 THE COURT: Hi, Mr. Knox. Just have a
12 seat right there.

13 Let the record reflect that
14 we are all still in chambers. Present are defense
15 counsel and the prosecutor's office and Mr. Knox has
16 now been brought in.

17 Mr. Knox, first of all, I
18 don't want you to feel any problem here. As I
19 indicated to you, that's one of the reasons I wanted
20 you to wait here. The lawyers do have a couple of
21 questions that they would like to ask you and nobody
22 is going to badger you or anything else. Don't feel
23 uncomfortable about it. But this is, again, because
24 of the type of case that we are dealing with, this is
25 a normal type procedure.

Going in order, Mr. Slavens
at this point. And we'll back up just a minute.

So that you know, Mr. Knox, I have explained in very, very brief detail what you advised me verbally. I've also shown counsel the letter from Dr. Moon, and so, so they know just generally the situation. I didn't get into any real specifics.

Mr. Slavens, any questions?

MR. SLAVENS: Just so I'm clear on what the Court sort of earlier informed, I guess Dr. Moon is treating you for mental health situation?

MR. KNOX: Depression.

MR. SLAVENS: Okay. And that he's indicated it's been, his treatment of you has been occurring since sometime in the past?

MR. KNOX: November of last year.

MR. SLAVENS: '92?

MR. KNOX: Two.

MR. SLAVENS: All right. And I think everybody appreciates the fact you called this to our attention. You believe, and I think what the doctor indicates, that it would not be wise for you to continue serving as a juror?

MR. KNOX: Yeah. I had, I had a

1 Tuesday appointment with him as a normal, about a
2 month, once a month with Dr. Moon. He's a
3 psychiatrist. And once every two weeks with one of
4 his therapist. Before, it was twice a week and the
5 last two months I've tapered off. I've been doing
6 really good. And this all resulted from getting laid
7 off for the second time from my company after they
8 moved me here. This was this past October. And
9 that's what brought this on. And I've been doing real
10 good and so I didn't see any problem in showing --
11 coming. And I been on a jury before. And I thought,
12 you know, it would be my, I felt it was my obligation
13 to do that. And then so I changed my regular
14 appointments from Tuesday during the day because I
15 told him I was in jury and to 5:15 last night for this
16 week to go see him.

17 So after we recessed, I
18 waited and went over -- he's over here right on First
19 Street. And I talked to him and I told him by the end
20 of the day yesterday, with all the testimony and
21 everything, you know, the immensity of everything, I
22 was really feeling really stressed out again, I mean,
23 to the point that if I continued, I really didn't feel
24 that I could by the end of the testimony and
25 everything, be in a good mental state. So to say from

1 my past from what had happened before, because I had
2 anxiety attack or two from the previous stress, and I
3 didn't want to let it go any longer. And he agreed
4 100 percent. And, and his advice was that I should at
5 this time bring it to the attention of the Court.

6 MR. SLAVENS: That's all I have. I think
7 you explained it a little bit probably what you told
8 the Judge.

9 THE COURT: Right. That's pretty much
10 the same thing that Mr. Knox previously indicated to
11 the Court.

12 Mr. Arntz or Mr. Monta?

13 MR. MONTA: Thank you, Judge.

14 Mr. Knox, this is basically
15 stress related, right?

16 MR. KNOX: Right.

17 MR. MONTA: And we are wondering if
18 this condition as it were would 'cause you to lose
19 concentration or maybe even distort what you're
20 hearing because of that?

21 MR. KNOX: It, it has, from my past
22 experience, when it started, definitely, definitely
23 interferes with my concentration.

24 MR. MONTA: Okay.

25 MR. KNOX: And then when I get -- I'm

1 still on antidepressant medication and then I have
2 some mild tranquilizers that if, mainly at work, you
3 know, I will take one of those or two of those a day.
4 And so, yes, it would, it would, I think it would
5 influence or affect my concentration. And, and, and
6 in the long run when we got -- I was thinking ahead to
7 the deliberation, is, is just not allow me to, to
8 concentrate on the whole process in light of the
9 seriousness of what I've seen in the last two days.

10 MR. MONTA: You feel you're able to
11 predict this because it has happened in the past?

12 MR. KNOX: Right.

13 MR. MONTA: Okay. It's typical of that
14 type of problem?

15 MR. KNOX: Right. But that was three
16 and four months ago. And the last two months, I been,
17 I've been doing real well, you know. I've been
18 working through having these problems. And that's why
19 I didn't think at that time through our questioning
20 that it was to be pointed out because I felt real good
21 about, you know, which I need to do, about myself and
22 my capabilities.

23 MR. MONTA: You're saying then that the
24 testimony probably has, to you anyway, is much more
25 stressful than the voir dire type of dialogue?

1 MR. KNOX: Right. And, and much more
2 involved in and detailed than, than I would have ever
3 imagined 'cause the only other jury I sat on before
4 was this shoplifting case, and that was, you know,
5 pretty cut and dry, one or two witnesses. And the
6 biggest problem there was the deliberation and we got
7 through that and came to a guilty verdict. But with
8 all the details here and trying to keep everything
9 sorted out, by the end of the day yesterday when I
10 talked to Dr. Moon, I don't think it would be in the
11 fairness of, of the defendant.

12 MR. MONTA: In your mind do you believe
13 the tension is, at least for you, is building and
14 based on the experience before?

15 MR. KNOX: Right.

16 MR. MONTA: You feel that could keep
17 your concentration at the highest level?

18 MR. KNOX: Right. Then what is
19 happening with these anxiety attacks when it gets to a
20 point, I get a physical stomach illness and I don't
21 want to get out of bed. But like I said, that was
22 months ago. And I didn't realize that it would -- I
23 really feel like I'm letting the Court down but I
24 needed to let you know.

25 THE COURT: I've indicated to you I

1 would much rather have you let us know than not let us
2 know.

3 MR. KNOX: Then wait until it creates
4 a problem.

5 THE COURT: Anything further?

6 MR. MONTA: I have nothing further.

7 That's very clear.

8 MR. SLAVENS: Nothing.

9 THE COURT: What we'll do is go back to
10 the jury room.

11 MR. SLAVENS: Is he with the other
12 members?

13 THE COURT: Yes.

14 MR. KNOX: But I haven't discussed
15 anything with them.

16 THE COURT: Right. Instead of doing
17 that, why don't you go out the front and have a seat
18 by the, right out here in the front of my office.

19 (WHEREUPON, Mr. Knox was excused from the
20 Judge's chambers.)

21 THE COURT: Does either counsel want to
22 be heard on this issue?

23 MR. SLAVENS: I think it's relatively
24 clear of what his condition is, your Honor. I think
25 the Court can proceed accordingly.

1 MR. ARNTZ: I think we'll leave it up
2 to the Court.

3 MR. MONTA: I think we will stand mute
4 on this one.

5 THE COURT: Well, the Court, in view of
6 the entire set of circumstances, regretfully will
7 excuse the juror and order that the 13th juror become
8 number, whatever number Mr. Knox is, and that the 14th
9 juror will be our last and lone alternate as we start
10 into a Thursday.

11 MR. MONTA: Do we need --

12 THE COURT: I want to go off the record
13 in a minute. He made a very unusual request of me
14 which I will tell you about later.

15 Off the record.

16 (WHEREUPON, a discussion was held off the
17 record.)

18
19 THE COURT: Let the record reflect we
20 are in chambers and I believe we are going to discuss
21 the admissibility of some letters that were apparently
22 or allegedly written by the defendant to Mr. Walter
23 Polson. The Court's been provided with three separate
24 documents purporting to be three separate letters from
25 the defendant to Walter Polson.

1 It's my understanding the
2 defendant, the defense attorneys on behalf of Mr. Howe
3 are waiving his presence for the purpose of this
4 discussion, is that correct, Mr. Arntz?

5 MR. ARNTZ: That's correct.

6 THE COURT: All right. Mr. Slavens.

7 MR. SLAVENS: Well, because this is, I
8 guess, an informal motion in limine, or something to
9 that effect, we would propose, and so the Court would
10 know and the record is clear, if, during the testimony
11 or during the testimony of Mr. Polson, I plan on
12 showing to him what I consider two separate documents.
13 I think three, there is three pages, one is the eight
14 and a half yellow page that I have. It starts out,
15 quote, for Sunday, June 21, parens, Father's Day.

16 THE COURT: I have that.

17 MR. SLAVENS: Show him that document. I
18 also plan to, for him to identify and also show him a
19 document that starts out, it's on a smaller, probably
20 maybe 4 by 8 white paper, single spaced, two of those.
21 One starts out, Walt, are you going to testify for me
22 on number 2 also? And then the fourth side of that
23 page, if you will, starts, completes the term or ends
24 with, "flush this." That is the total of two pages
25 front and back of each. And I believe the witness

1 will be able to identify the documents and testify
2 about them and what he did as a result of receiving
3 the documents if anything.

4 MR. ARNTZ: Before we begin to discuss
5 it, I want to make sure I have these pages in order.
6 One of these documents begins, Walt, are you going to
7 testify for me?

8 MR. SLAVENS: Right.

9 MR. ARNTZ: The very next side of that
10 document begins how?

11 MR. SLAVENS: The flip side of that page
12 would start out, "got has wallet - started to."

13 MR. ARNTZ: And the next document
14 begins with?

15 MR. SLAVENS: I think what I would
16 classify maybe -- oh, it's got number 3 at the top.
17 It would be in numerical order. "One of you - Tony -
18 yelled, get rid of the guns."

19 MR. ARNTZ: And the next document
20 begins, "Tony bent down."

21 MR. SLAVENS: Yeah.

22 MR. ARNTZ: Okay.

23 THE COURT: All right.

24 MR. SLAVENS: And I presume the defense
25 objects or something that they wish to proffer?

1 MR. ARNTZ: I guess our first comment
2 is, we are not clear as to which evidence rule the
3 prosecutor is, which evidence rule it is that the
4 prosecutor claims makes these documents admissible.
5 There are a number of different possibilities.

6 THE COURT: Well, let's deal with it.
7 I'm concerned about the overall contents referring to
8 other matters that would not necessarily be
9 admissible, such as, in one document the parole
10 situation.

11 MR. SLAVENS: That can be readily handled
12 by being redacted from this. I think on the document
13 which is, "okay, hoss boss," it's two lines, portion
14 of the third line, that could be redacted. I think
15 quite --

16 THE COURT: Let me ask this question.
17 After the document is handed to the witness, what is
18 the witness going to do with the document?

19 MR. SLAVENS: Going to say he received it
20 from Mr. Howe.

21 THE COURT: And then that's it?

22 MR. SLAVENS: Well, he's going to explain
23 what the document says.

24 THE COURT: All right. Where are we,
25 Mr. Arntz?

1 MR. ARNTZ: Well, we provided the
2 Court, in a previous written motion, citations to
3 authority which would exclude this type of material as
4 not being statements made in furtherance of the
5 conspiracy. And if that is the theory under which the
6 State is attempting to introduce the documents, we
7 feel that the case law is clear that should not be
8 permitted.

9 MR. SLAVENS: I don't believe that's our
10 position this is in furtherance of a conspiracy. And
11 I think this actually shows that the defendant on
12 trial was attempting to get this particular witness to
13 come to court and lie.

14 MR. ARNTZ: Well, our position is this
15 is hearsay unless it's, it's available under some
16 hearsay exception and I think --

17 MR. SLAVENS: It's not.

18 MR. ARNTZ: The foundation is for the
19 prosecutor to indicate which exception they believe
20 makes this material admissible.

21 MR. SLAVENS: Well, I disagree it's
22 hearsay. It's statement from the defendant directly
23 to the witness.

24 THE COURT: If I understand the State's
25 position, it falls under Rule 801(D), Statements which

1 are not hearsay, subsection 2.

2 MR. SLAVENS: I don't have the particular
3 book in front of me. If the Court would tell me the
4 gist of that.

5 (Judge handing the book to Mr. Slavens.)

6 MR. SLAVENS: Yeah. I think that is
7 applicable as well as is the direct statement of a
8 witness whether it be in writing or not. Defendant --

9 MR. ARNTZ: 801(D)(1) is the prior
10 statement of a witness. That does not apply because
11 that rule only applies where the witness testifies at
12 trial, that is, the declarant is a witness at trial.

13 THE COURT: Right.

14 MR. ARNTZ: And our client would have
15 to be the declarant. He would have to testify in
16 order to qualify. So if we focus on 801(D)(2)(a),
17 admission by a party-opponent, our first argument
18 under that rule is that this first document does not
19 qualify as an admission to anything. The rules
20 distinguish between statements and admissions. And
21 admissions are more specific than statements.
22 Admissions contain material which is in the nature of
23 a confession or directly incriminated toward oneself.
24 To the contrary, this document is, if anything,
25 exculpatory in its contents, so I don't think it

1 qualifies even as an admission by Howe if Howe wrote
2 it.

3 THE COURT: Are you relying on
4 subsection (e) or (a) or both?

5 MR. SLAVENS: Actually I'm not trying to
6 hedge, your Honor, but, no, I believe after reading
7 (a) and (e), that they do both apply. This is a
8 definite statement, I submit, by the defendant. And I
9 think (e) upon reading it in its entirety does also
10 imply contrary to what Mr. Arntz claims.

11 THE COURT: Mr. Arntz, anything
12 further?

13 MR. ARNTZ: Well, again, just as to
14 this first document dated June 21st, we don't feel
15 that it qualifies as an admission under 801(D)(2)(a).
16 Likewise, it doesn't qualify under 801(D)(2)(e)
17 because the case law we provided the Court indicates
18 that once co-conspirators have been discovered, that
19 their identities have been learned and they have been
20 arrested, these types of communications no longer
21 qualify in statements made in furtherance of the
22 conspiracy because the conspiracy technically no
23 longer exists. They can't achieve the aims of the
24 conspiracy once they're all locked up in the county
25 jail. That's what the case law says. And we provided

1 the Court the cases that say that.

2 We have some further
3 arguments about that document as well if the Court
4 wants to hear those.

5 THE COURT: Well, I do. I want to hear
6 whatever arguments -- you just talking about the one
7 now?

8 MR. SLAVENS: Right.

9 MR. ARNTZ: Right. Just the one
10 because I think the two documents are of a different
11 nature. They're not the same kind of material in
12 each.

13 THE COURT: All right. Go ahead.
14 Proceed.

15 MR. ARNTZ: Likewise, we feel that even
16 if, arguably, this first document was admissible under
17 801.(D)(2), that it is limited by Rule 613. It must
18 be read in conjunction with 613. 613(B) provides
19 that: Extrinsic evidence of a prior inconsistent
20 statement by a witness is not admissible unless that
21 witness is provided a prior opportunity to explain the
22 document.

23 And of course the unique
24 situation here is that the alleged author of the
25 document is the defendant who has a constitutional

1 right not to testify in his own trial. And this is a
2 document which would otherwise be clearly hearsay. In
3 other words, the State is maneuvering him into the
4 position of taking the stand and either denying that
5 he wrote the document or explaining it.

6 THE COURT: Mr. Slavens.

7 MR. SLAVENS: Well, we're not talking
8 about prior inconsistent statement of a witness. I
9 think again Mr. Arntz is stretching in that regard.

10 As to how the most recently
11 quoted rule, I think 613 applies in this situation. I
12 think it's clear this is a statement. The evidence
13 will be clear this is a statement of the defendant and
14 it's admissible for appropriate and relevant purposes.

15 THE COURT: I don't think Rule 613
16 applies in this particular situation. The documents
17 themselves -- going back to your first argument, I'm
18 thinking out loud and talking on the record, is, well,
19 at this point I'm assuming, and correct me if I'm
20 wrong, Mr. Slavens, but it's the State's theory that
21 this is clearly a furtherance of the conspiracy
22 because it's a conjuring up of a story to be told at
23 trial.

24 MR. SLAVENS: Well, that is correct. I
25 think you also have to understand that a subsequent

1 witness by the name of Elofskey will be testifying
2 about also documents received from Mr. Howe wherein
3 the conjuring up, if you will, of the testimonial
4 basis also is developed by the defendant on trial in
5 this case.

6 THE COURT: So this is not, this is
7 not, we are not talking about a -- first of all,
8 Mr. Howe is not the witness, so it's not a prior
9 inconsistent statement of a witness. It would be if
10 you had a letter from Mr. Polson in your possession to
11 Mr. Howe, that this rule would quicken as if it was
12 inconsistent with what he testifies here. That's the
13 way I interpret Rule 613.

14 MR. SLAVENS: Yeah.

15 THE COURT: But at this point in
16 time -- well, strike that.

17 Let me ask this question.
18 Are there some verbal conversations between Polson and
19 Howe that relate to these various documents either
20 preliminary or follow-up conversations at the jail
21 where they actually discussed the letters?

22 MR. SLAVENS: Yes. Their discussions are
23 some of what a limited nature due to the fact they're
24 both incarcerated, not like you and I speak.

25 THE COURT: Mr. Arntz, well,

1 additionally with regard to this first document,
2 obviously, there is some, there are two to three
3 comments which at a minimum must be stricken even if
4 the Court should let the remainder of the document go
5 to the jury. The bottom of the third paragraph on the
6 first page, the sentence about not mentioning about
7 the parole.

8 MR. SLAVENS: I agreed with that. We can
9 redact that.

10 MR. ARNTZ: We probably agree.

11 THE COURT: Polson is not going to read
12 it. Let's assume I read this. Polson is not going to
13 read the letter, is he?

14 MR. SLAVENS: He's going to have to read
15 it to be able to identify -- he will have to look at
16 it in order to identify it.

17 THE COURT: I understand that he's not
18 going to read to the jury its contents.

19 MR. SLAVENS: No.

20 THE COURT: We don't have to worry
21 about these kinds of things now. We will deal with
22 them eventually.

23 MR. ARNTZ: Did I misunderstand? He's
24 not going to read them at all or --

25 MR. SLAVENS: He's going to read them to

1 identify them, not reading the entire document out
2 loud.

3 MR. MONTA: On the stand reading some
4 of it out loud?

5 MR. SLAVENS: Yeah, he will explain what
6 it is.

7 MR. ARNTZ: We'll be objecting to that
8 because the document will, will speak for itself.
9 There's no need for anybody to read it or interpret
10 it. It's just like any other document.

11 THE COURT: Okay. But that's, that's
12 the least of the issues here.

13 MR. ARNTZ: We also feel with regard to
14 the second document, this one that begins, are you
15 going to testify for me? That, likewise, there is
16 nothing in that document which is an admission by the
17 party-opponent, our client, that he committed any
18 criminal activity. And again, this Rule 801(D)(2)(a)
19 speaks specifically of an admission rather than a mere
20 statement. While it may qualify as a statement of
21 some sort, it is not an admission to anything. It
22 cannot be admissible under that rule for that reason.

23 MR. SLAVENS: The point is, the jury is
24 going to have an opportunity to compare these letters
25 with the documents we intend to offer when

1 Mr. Elofskey testifies.

2 THE COURT: Okay. Go ahead, Mr. Arntz.
3 Anything further?

4 MR. ARNTZ: Well, I think what the
5 prosecutor just said is that perhaps this particular
6 document, or both of them for that matter, may not
7 qualify as admissions but if you only let us introduce
8 all of the other forthcoming letters from our next
9 witness Elofskey, then in context somehow all of these
10 documents, which individually do not constitute
11 admissions, will together as a group become an
12 admission to something. And that is really
13 far-fetched. The rule speaks of not of qualifying any
14 document in the context of a group of documents, it
15 speaks only of a statement which is an admission. So
16 I think our position is the Court must qualify each
17 document one at a time and cannot make a ruling about
18 the documents as a group. Each document either
19 qualifies or doesn't qualify under the rules.

20 MR. SLAVENS: If I may, your Honor. If
21 you go back to the last (D)(2)(e), I don't think that
22 any of the rules interpret the term, statement, in a
23 singular fashion. I think you have to look at it in
24 totality.

25 Basically, what you have,

1 what we would submit, this is relevant for there's
2 going to be inferences either on sometime that this
3 witness, Mr. Polson, is lying. And the evidence will
4 be that even in the opening statements and even on his
5 direct testimony he stated he's never been asked to
6 lie by the State of Ohio. The only person that asked
7 him to lie is Mr. Howe.

8 MR. ARNTZ: To rely what the prosecutor
9 just said, the Court looks at 801(D)(2), that
10 paragraph begins with the words, the statement --
11 801(D)(2)(a) begins with the words his own statement.
12 801(D)(2)(b) begins with the words, a statement.
13 Likewise, (c) begins with, a statement. (d) is, a
14 statement. And (e) a, a statement. So the rule is
15 clear that the Court must review each "statement"
16 singularly in deciding whether it is admissible.

17 MR. SLAVENS: I think that's
18 preposterous. Even if you take a look at the
19 definition of statement, which is defined in 801 --

20 THE COURT: Right.

21 MR. SLAVENS: -- in the staff notes that
22 relate to it, and even talk about conduct as a
23 statement, and what Mr. Monta would have one do is
24 each time a person makes some conduct, he would be
25 broken down into frame like a movie and you can only

1 put in one portion of it at a time and I think
2 that's --

3 MR. ARNTZ: Well, there again,
4 801(A)(1) is specific. It says that a statement is an
5 oral or written assertion, singular and not plural.
6 That's what, exactly what we have here.

7 THE COURT: Well, let me ask this
8 question. Is it your position, Mr. Arntz, that if the
9 State had a letter from a person saying, and I'm
10 summarizing, on Easter Sunday I was in California with
11 my brother. And that's all it says. No admission
12 against interest other than that statement. And has
13 another letter to another person or even the same
14 person saying on Easter Sunday the same year I was in
15 Dayton, Ohio, in a local pub with Mike, John, and
16 Raymond. That in and of itself is not an admission.
17 What you're saying to me then is, and I'm articulating
18 right into the record here, that neither of those
19 statements would be admissible under the rules as you
20 are presently reading them.

21 MR. ARNTZ: Well, I think that's
22 correct, if you interpret the rule literally. But I
23 don't think you even have to reach that because the
24 State hasn't made any showing that any documents when
25 compared are contradictory to each other as you

1 suggest. There is no showing that these documents
2 contradict each other in that sense constituted
3 admission in view of your contradiction, if I
4 understand what you're saying.

5 THE COURT: Right.

6 MR. ARNTZ: We don't even have that
7 here.

8 THE COURT: Do you have a response to
9 that, Mr. Slavens?

10 MR. SLAVENS: No. Well, I do. And he's
11 not one hundred percent correct. The contradiction
12 is -- in fact in the letter there are some
13 contradictions when you read them in their entirety.
14 And one of the glaring contradiction is the fact when
15 he speaks to Mr. Elofskey, he, Mr. Howe, is telling
16 Mr. Elofskey that Polson did the shootings and when
17 he's talking to Mr. Polson, he's telling Mr. Polson
18 that if they stick together and say that, that it was
19 Elofskey that did the shootings, point in fact, he
20 knows he's the party that's accused of doing himself
21 the shooting.

22 MR. ARNTZ: Now, to --

23 MR. SLAVENS: That's basically it.

24 MR. ARNTZ: If that was the content of
25 the letters to Polson as compared to the letters to

1 Elofskey, that still isn't the case that the Court
2 suggested where the defendant says, I was in one town
3 one day and another town another day because in both
4 of the letters to Elofskey and Polson, our client
5 denies shooting anybody. He does not incriminate, if
6 I recollect correctly.

7 MR. SLAVENS: I don't.

8 MR. ARNTZ: If I recollect correctly,
9 he does not admit to killing anybody in any letter.
10 So the fact that he makes dissimilar noninculpatory
11 statement doesn't make those admissions to anything.
12 Now those letters could be used to impeach him if he
13 testified and say, well, on one day he said --

14 THE COURT: I understand all of that.
15 But we're dealing now with the State of Ohio, State of
16 Ohio's case in chief.

17 MR. ARNTZ: When he doesn't testify,
18 the rules, only admission if it's in the nature of an
19 admission to something.

20 THE COURT: Any other arguments on
21 either of these?

22 MR. ARNTZ: Well, only that the Court
23 cannot rule on the admissibility of these two
24 documents based upon some argument that in context
25 with other documents, they are admissible unless and

1 until the Court reviewed all of the other documents.
2 If the Court is going to entertain that theory, you
3 would have to read every one of these documents,
4 entertain arguments to the whole group.

5 MR. SLAVENS: And that can easily be
6 done. We only intend with Elofskey, that there is one
7 document. I can go get it.

8 THE COURT: Let's do that and see where
9 we are.

10 (WHEREUPON, a discussion was held off the
11 record and then in-chambers proceedings were then
12 concluded.)

13
14 IN OPEN COURT - BEFORE THE JURY

15 10:49 a.m.

16 THE COURT: Good morning, ladies and
17 gentlemen of the jury. Obviously, we are a little
18 later this morning than we originally anticipated.
19 We've had a series of events develop. The first of
20 which, as you will notice, juror number ten, Mr. Knox,
21 is no longer with us. He has been excused for
22 personal reasons. And the practical impact to you is
23 very definitely on Ms. Merriman who now will become
24 juror ten. So if you will take that seat over there.
25 And, Ms. Elam, I realize you're probably used to that

1 position. Do you prefer to stay there or do you want
2 to move over here to the normal 13th juror?

3 MS. ELAM: I will move over there.

4 THE COURT: Why don't you move over
5 here then.

6 MS. ELAM: Okay.

7 THE COURT: So that is an explanation
8 for part of the delay. The other portion of the delay
9 was through no one's fault. We were dealing with some
10 legal issues. Hopefully, and they're not, as we
11 speak, resolved at this point, but they will become
12 resolved, obviously, in order to keep going. And
13 these things happen in any trial. I just want you to
14 understand that delays do occur and it's to make sure
15 that everything is proceeding appropriately and
16 according. And, again, we are still going to be
17 recessing around the noon hour. The Court has these
18 other matters to deal with this afternoon.

19 I'm sure you are all aware
20 of the weather. We will talk about that when we are
21 done for the day.

22 In any event, I believe the
23 State's ready to call its next witness.

24 MR. SLAVENS: We are, your Honor.

25 THE COURT: Is the defense ready?

1 MR. MONTA: We are.

2 MR. ARNTZ: Yes, sir, we are.

3

4 CARL H. HAEMMERLE, having been first duly
5 sworn according to law, was examined and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. SLAVENS:

9 Q. Sir, would you tell us your name, please?

10 A. Carl H. Haemmerle, H-A-E-M-M-E-R-L-E.

11 Q. And what is your profession and/or occupation?

12 A. I'm a Firearms and Tool Mark Examiner at the
13 Miami Valley Regional Crime Laboratory in Dayton, Ohio.

14 Q. And for how long have you been with the Miami
15 Valley Regional Crime Laboratory?

16 A. It will be five years next month, sir.

17 Q. And you made reference to the term, I think you
18 said, firearms examiner and tool mark examiner?

19 A. Yes, sir.

20 Q. How long have you been so designated?

21 A. For five years, sir.

22 Q. And what is a firearms examiner and/or a tool
23 mark examiner?

24 A. My, my job at the laboratory is to examine
25 weapons that come into the laboratory, test weapons for

1 function, see if they're in proper working order, seeing
2 to test firing to make sure they're operable, do bullet
3 and cartridge case comparison, ammunition component
4 identification, powder patterns and distance
5 determinations from clothing.

6 I do -- I process all firearms and tool mark
7 evidence for fingerprints. If any are found, I then
8 lift the prints and send the cards to another
9 department.

10 I also am responsible for footwear and tire
11 impression evidence, tool mark evidence, restoring
12 serial numbers, tool mark impressions. Basically
13 anything that has to do with a firearm or generated by a
14 mark left by a tool comes into my section of the
15 laboratory.

16 Q. And have you had any training, specialized
17 training to prepare you for your field that you've been
18 working on now for five years?

19 A. Yes, I have.

20 Q. And explain to us briefly a little bit about your
21 educational background as it relates to your specialized
22 field of firearm and tool mark examination?

23 A. I served under Mr. David Taulbee who was the
24 firearms and tool mark examiner at the crime lab. He
25 had 20 years of experience when he trained me. There

1 are no colleges or schools you get this experience at.
2 You basically have to learn it under a competent
3 examiner.

4 Along with learning your trade under an examiner,
5 there are schools you go to. I been to training from
6 the Alcohol Tobacco and Firearms. I've also been
7 through training with the FBI in gun powder and gunshot
8 residue detection. That's for the gun powder patterns.
9 I've also been through training with the FBI in
10 classification of fingerprints and processing and
11 lifting latent fingerprints. I've also received
12 training through the Ohio Bureau of Criminal
13 Identification in tool mark identification. Also attend
14 workshops given by the Association of Firearms and Tool
15 Mark Examiners, which is the association for persons in
16 my profession which I'm a member of that profession or
17 of that association. So I basically had an ongoing
18 training process. It's an ongoing process. If there is
19 something that is new that comes out in the field, there
20 is a school present, you sign up and go to the schools.

21 And in, in accordance with that, for five years
22 prior to becoming a staff at, the staff member at the
23 laboratory, I was a police officer assigned to the
24 Dayton Police Academy and I did four years as a range
25 officer. So I was already familiar with firearms

1 through that profession. And I also had training from
2 Smith & Wesson, Glock, Mossberg, and Sigsauer as a
3 armorer for their weapons and their types of weapons.

4 Q. You mentioned the term Smith & Wesson and Glock
5 and a few others. Are those concerns manufactures of
6 weapons?

7 A. Yes. Those are manufactures of weapons.

8 Q. Have you ever had an opportunity to testify in
9 court concerning your examinations, your firearms
10 examinations, tool mark examinations on prior occasions?

11 A. Yes, I have.

12 Q. Approximately how many times have you so
13 testified?

14 A. Fifty-five times in common pleas court in the
15 State of Ohio.

16 Q. Now, sir, I would like to direct your attention
17 to whether or not if you ever received in your offices
18 any weapons concerning, and I'm going to hand them to
19 you, what I'm going to call a Raven Arms and Bryco. I
20 will hand you items that have been marked State's
21 Exhibit 43. And while you look at that, I will also
22 place in front of you another item that's been marked
23 State's Exhibit 38.

24 A. State's Exhibit 43 bears my initials, the date
25 that I, I put the weapon back in the gun envelope. My

1 initials are under the slide of this weapon. That's
2 where I commonly mark semiautomatic weapons.

3 Q. What exhibits are you referring to?

4 A. This is Exhibit No. 43. It had a Raven Arms
5 serial number 1559350. It also contains an envelope
6 with five 25 caliber cartridges. Each one of these
7 cartridges are in a plastic bag that has my initials and
8 my seal. And the seal is unbroken. And my initials are
9 also on the magazine that would hold the ammunition when
10 you load it into this particular weapon. All of that is
11 Exhibit 43.

12 Q. Before you, concerning Exhibit 43, and are you
13 familiar with the, I don't know what the word would be,
14 I want to say the holding capacity for the magazine for
15 the Raven is?

16 A. Yes, sir.

17 Q. That gun would, with the magazine fully loaded,
18 it would hold how many bullets?

19 A. The magazine would hold six cartridges.

20 Q. And when you received it, how many cartridges did
21 it contain?

22 A. The magazine contained four cartridges. One
23 cartridge was in the chamber of the weapon.

24 Q. And with reference to the Exhibit 38 -- if you
25 would, obviously, I want you to keep those items

1 separate.

2 A. The Exhibit 38 bears my initials and my mark on
3 it. My initials are also under the rear of the slide on
4 this particular weapon. This weapon is a model 25.
5 It's a Bryco by Cal-Westco. It's a serial number
6 002073.

7 Q. And what is the -- when you received it, what
8 else did you receive?

9 A. When I received it, it was hanging up by the
10 string. And it had a magazine with two 25 caliber
11 cartridges in the magazine and one cartridge in the
12 chamber. The cartridge, when I finished with them, put
13 them in the plastic bag, sealed the plastic bag and also
14 marked the magazine.

15 Q. While on, on there, the Exhibit 38, the Bryco,
16 what is the capacity of the clip, holding capacity of
17 that clip?

18 A. Seven.

19 Q. Now, when you received either one of those two
20 weapons, did you mention they were on a string or at
21 least one was?

22 A. They were both.

23 Q. And did you initially conduct any test in efforts
24 to locate what I'm going to use the term latent
25 fingerprints?

1 A. First thing I did was processed these weapons for
2 latent fingerprints using the cyanoacrylate,
3 C-Y-A-N-O-A-C-R-Y-L-A-T-E, commonly referred to as the
4 supergluing method. I then, after processing them with
5 superglue, dusted them for prints and took several tape
6 lifts from each of these weapons.

7 Q. Now, when you take the tape lift from each of the
8 weapons at that time, do you know whether or not those
9 tape lifts are usable for any identification purposes?

10 A. No, I do not evaluate the tape lift. If I find
11 something on a weapon that would look like it would have
12 the remotest possibility of any type of ridge detail, I
13 pass it on.

14 Q. Did you ever have an opportunity to determine the
15 operability of those weapons?

16 A. Yes, I did. After, after processing them for the
17 fingerprints, I took them down to the shooting lab,
18 which is in my lab I have in the basement of our
19 laboratory, I have a range. And I fired several bullets
20 into a water recovery tank. I recovered bullets from
21 each weapon and the cartridge casings fired in each
22 weapon for later comparison purposes.

23 Q. Do you fire your own ammunition or do you fire
24 the ammunition that was already in the magazine?

25 A. No. I fire my own ammunition, sir.

1 Q. By the way, on the, I guess it's the Raven, how
2 many bullets are there and how many did you recover from
3 the Raven?

4 A. • Five.

5 Q. So when you received the Raven, it had five
6 bullets in it?

7 A. Four in the magazine and one in the chamber.

8 Q. Okay. Now, you were indicating how you
9 determined, I guess, the operability of those weapons?

10 A. Yes, sir.

11 Q. And did you do that?

12 A. Yes, sir. I did an operability check on them. I
13 looked to see if there was gun powder present in the
14 barrel. Both weapons had gun powder in the barrel. I
15 also looked to see if there was gun powder on the breech
16 face or under the extractor. The breech face would be
17 the part of the weapon that holds the cartridge into the
18 chamber. And there was powder in the breech face area.
19 And also looked for powder under the extractor. The
20 extractor is the part that pulls the cartridge case out
21 of the fired cartridge case out of chamber. And
22 underneath both extractors there was gun powder present,
23 gun powder residue present.

24 Q. And based upon, upon that examination and also
25 based upon your firing the weapons, did you arrive at an